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In the Supreme Court
OF THE
United States

October Term, 1942

No. 213

Southern Pacific Company
(a corporation),
Petitioner,

vs.

Gladys Viola Haight,
Respondent.

BRIEF FOR RESPONDENT.

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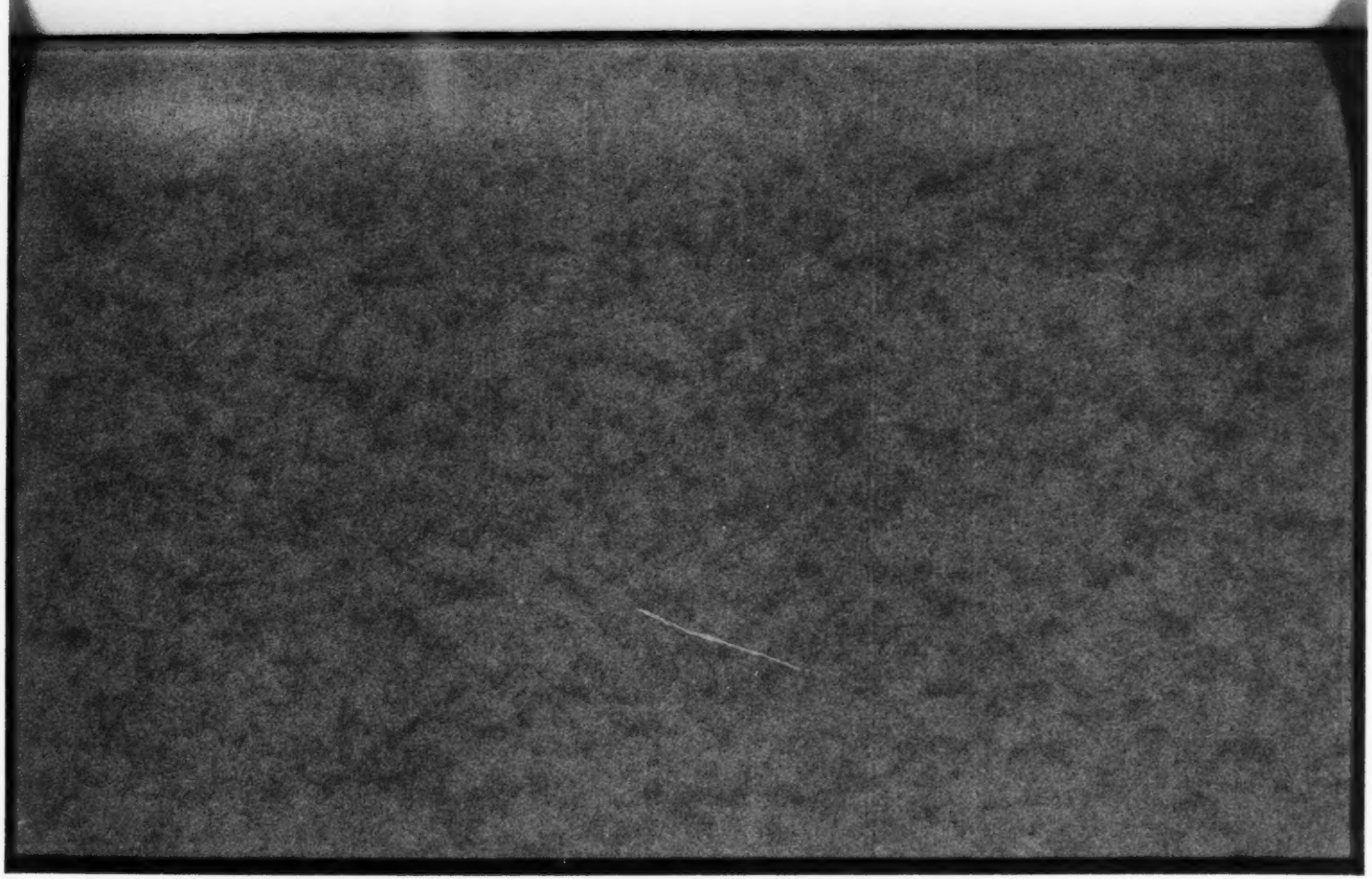

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SOUTHERN PACIFIC COMPANY
(a corporation),
Petitioner,

vs.

GLADYS VIOLA HAIGHT,
Respondent.

BRIEF FOR RESPONDENT.

In this action for damages for negligence in the maintenance and operation of a railroad crossing and in the handling and operation of a train thereon the petition for writ of certiorari mistakes or mistates both matter and fact relied upon for reason that a writ should issue.

The facts are stated in the opinion of the Circuit Court of Appeals. (R. pp. 560-587.)

INACCURACIES OF THE STATEMENT UPON WHICH THE PETITION IS BASED.

At the time in question the crossing at which the accident occurred was unlighted and unmarked except for two unlighted wooden cross-arm signs, one on either side of the track and approached by the auto traveler only *after* he had encountered and negotiated the crossing; that to the south side of the highway and therefore on the right of the eastbound travel was located *east* of the railroad crossing and 14 feet removed from the south or right-hand edge of the highway (R. pp. 74; 92; 95); that on the north side of the highway was similarly located west of the railroad crossing and 14 feet removed from the north edge of the highway. (R. pp. 73 and 91.) The highway was 20 feet in width. The crossing sign that might be expected to be useful to the eastbound respondent or the driver of the machine in which she was a passenger was 23 feet removed from the center and side of the roadway upon which she traveled. (R. p. 91.) On both sides of the track the crossing signs were located in line with a string of power poles paralleling the highway at a distance of 20 feet and 23 feet from the center line thereof, which tended further to obscure the crossing signs even under the most favorable conditions of visibility. (R. pp. 92-93 and 94-95.)

In the petition (p. 4) the crossing sign to the west of the track and to the north of the highway being traversed by respondent in an easterly direction is mistakenly or inadvertently stated to have been 4 feet removed from the north edge of the highway, whereas petitioner's own engineer, Micander, who surveyed

the scene in the days following the accident, testified that this crossing sign was 23 feet from the center of the highway and 14 feet from the north edge of the highway. (R. pp. 73-74; 91.)

Among the issues submitted to the jury was the question whether the defendant Company had complied with General Order 75-A of the Railroad Commission of California which reads in part as follows:

> "Subdivision 5: (a) Each public crossing at grade of a road, highway or street with a track of a railroad * * * shall * * * be protected by at least one crossing sign, constructed and installed in substantial conformity with the specifications herein illustrated and designated as Standard No. 1, * * *
>
> "(b) Each crossing sign (Standard No. 1) herein illustrated shall be located in a conspicuous position facing highway travel, preferably at either corner of the crossing intersection of the right-hand side of the highway traffic flow and in advance of the railroad track."*

The decision of the Circuit Court of Appeals *does not,* as petitioner contends (Petition pp. 7-8), hold that to meet the Railroad Commission's requirement such crossing sign must under all circumstances be visible to travel approaching the track. The decision, applying the law as laid down by the latest decisions of the courts of California upon the subject, sustains

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*NOTE: Violation of the order of the Railroad Commission constitutes negligence as a matter of law. *Morris v. Sierra and San Francisco Power Co.*, 57 Cal. App. 281, 207 Pac. 262.

the action of the District Court in submitting to the jury the question whether at 8:45 p. m. on March 6, 1935, at Dorris, California ("the time and place of the accident"), the crossing sign was located *in a conspicuous position facing highway travel* (R. p. 489), and follows the California rule that if the company has been negligent in failing to warn of the location of the crossing then the presence of a train across the highway may or may not be sufficient warning of danger according to the circumstances of the case. (R. p. 577.)

In response to the request of the petitioner, the District Court instructed the jury that the crew was not obliged to provide a flagman or other means of warning to travelers of the obstruction of the crossing by a train "in the absence of some unusual environment" (R. pp. 533; 490), and the court *did not,* as petitioner contends (Petition p. 5), instruct the jury that if the snowstorm required some sort of signal or warning a flagman was required. The charge was that negligence could not be predicated upon failure to regularly maintain any human or automatic flagman or mechanical signal, bell, light or gates, and expressly and in accordance with petitioner's request (ante) limited the consideration of the jury to such action on the part of the "agents in charge of the train" and "the crew" as in view of all the facts and circumstances existing at the time and place the exercise of ordinary care required. (R. p. 490.) In this respect the charge has the endorsement of both petitioner's request and the law of the State of California.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED.

(1) The petition is premised upon an erroneous statement of fact and a misinterpretation of the opinion of the Circuit Court and of the charge of the District Court as already pointed out.

(2) The decision of the Circuit Court of Appeals follows and applies the law of California as laid down in the latest of the decisions of the District Court of Appeal and as earlier settled by the Supreme Court of this State.

(3) It is settled by decision in California that whether wooden crossing signs located at a distance removed from the highway and beyond the track constitute a compliance with the minimum requirement of the Railroad Commission for location in a conspicuous position facing highway travel is a question of fact.

(4) It is the law in California that compliance with the minimum requirements of statute or order of the Railroad Commission is not the absolute test of negligence and does not necessarily relieve the railroad from the necessity of taking such additional precautions as ordinary care may require.

(5) It is settled by law in California that mere knowledge of the existence of a crossing will not excuse the railroad from the requirement to mark its location, particularly toward the passenger in a vehicle who under California law is under no positive duty to keep a lookout for obstructions upon the highway.

ARGUMENT.

Under the heading of "Inaccuracies of the Statement Upon Which the Petition is Based" it has already been shown that to command the attention of this Court the petitioner had taken unseemly liberties with both the record and opinion of the court below. When the record is correctly stated there is, of course, no escape from the application of the rule laid down in *Harper v. Northwestern Pacific Railroad Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821, wherein it is stated:

> "* * * that a railroad track which is invisible on account of darkness or because it is otherwise concealed from view, is not a warning of danger, unless one knows just where to look for it."

The *Harper* case is the latest decision of the courts upon the subject and petitioner concedes there is nothing in the *Harper* case that is inconsistent or in conflict with the earlier decision of *Dunlap v. Pacific Elec. Ry. Co.*, 12 Cal. App. (2d) 473, 55 Pac. (2d) 894, wherein no question of the location of crossing signs was involved. Considered together the two cases would seem to lay down the rule as stated by the Circuit Court of Appeals that "where the railroad company has used due care to warn the public of the location of its railroad crossing, then an obstruction on the crossing is in itself notice of danger and the railroad company is not bound to give additional warning. But if the company has been negligent in failing to warn of the location of the crossing, then the presence of a train across an intersection might not be a sufficient warning of danger." (R. p. 577.)

Throughout its brief the petitioner proceeds upon the unwarranted assumption, repudiated by the evidence hereinbefore set forth, that the crossing sign was, as a matter of law, located in strict compliance with the minimum requirements of the Railroad Commission and hence it had discharged its entire duty under California law toward the traveling public. The Appellate Court held that the question of whether or not the crossing sign was located in a "conspicuous position" in compliance with the order of the Railroad Commission was a pure question of fact for the jury to determine; that this question was submitted to the jury "exactly as the defendant company contends it should have (been) done". (R. p. 580.)

With respect to petitioner's further assumption that it could not be held obliged to do more than install the unlighted crossing sign (regardless of its location) for the purpose of notifying travelers of the existence of the crossing, the Circuit Court of Appeals says:

> "Thus, if the defendant in the exercise of due care should have known that the cross-arm sign maintained by it would not be visible in a snowstorm not unusual to the vicinity, then it cannot rely on the maintenance of the cross-arm as a full discharge of its duty to warn the highway user of the presence of its railroad crossing and the danger incident thereto."
>
> 126 Fed. (2d) 900 at p. 908.

The foregoing, as announced by the Circuit Court of Appeals, is in complete accord with the California law as laid down by the courts of this State. In accord with the rule of the majority the California

courts have adhered to the doctrine that naked compliance with statute or order regulating the maintenance and operation at crossings is not the exclusive test of care or negligence. In California, as elsewhere, our courts have held that such regulations constitute only the minimum measure of care required of persons in charge of dangerous instrumentalities and that a railroad company, like any other, must in a proper case submit to the judgment of the jury the question of whether something more than the minimum of care was required under the facts and circumstances given in evidence.

In the case of *Bush v. Southern Pacific Co.*, 106 Cal. App. 101, 289 Pac. 190, the District Court of Appeal, in passing upon and approving an instruction in the same terms and to the same effect as the language of the charge and opinion here under attack, lays down the familiar rule that:

> " 'There are some authorities for the proposition that when a railroad company has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises, but the sounder doctrine is that the whole duty of a railroad company in respect of signaling the approach of its trains to highway crossings is not necessarily performed by a naked compliance with the statute in that behalf, and that such compliance does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway. * * * Neither the legislature nor the railroad commissioners can arbitrarily determine in advance what shall constitute

ordinary care or reasonable prudence in a railroad company at a crossing, but each case must stand upon its own merits and be decided upon its own facts and circumstances; and for this reason it is usually a question for the jury whether or not precautionary measures in addition to the ringing of the bell or the sounding of the whistle ought to have been adopted to prevent a collision, and whether under the circumstances of the case, the company used reasonable care.' (22 R. C. L. 998.)

'It is * * * held, in many of the states (in fact the rule is well-nigh, if not quite, universal) that a railroad company, under certain circumstances, will not be held free from negligence even though it may have complied literally with the terms of a statute prescribing certain signals to be given and other precautions to be taken by it for the safety of the traveling public at crossings. * * * The reason for such rulings is found in the principle of the common law that everybody must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way.' (*Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. Rep. 679; see, also, *Panama R. R. Co. v. Pigott,* 254 U. S. 552, 60 A. L. R. 1096, 65 L. Ed. 400, 41 Sup. Ct. Rep. 199, see, also, *Rose's U. S. Notes & Supp.; Tisdale v. Panhandle & S. F. R. Co.* (Tex. Com. App.), 228 S. W. 133, 16 A. L. R. 1273.)

The instructions under consideration state a rule of daily application in negligence cases. * * * While the violation of a regulatory statute or ordinance constitutes negligence as a matter of

law, 'it does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence'. (19 Cal. Jur. 634.) The great weight of authority is to the effect that statutory regulations constitute only the minimum measure of care required of persons in charge of dangerous instrumentalities, and a railroad company, equally with the driver of an automobile, must, in a proper case, submit to the judgment of a jury the question of whether something more than the minimum of care was required under the facts and circumstances given in evidence.

Considering the high speed of the train, the quietness of its approach and the difficulty of stopping it on the downgrade, the upgrade along the Otterbien Road to the crossing, the obstructed view from that road to the east and the position of the railroad cross-arms near the track and to the left of the road, it cannot be said as a matter of law that there is no evidence to which the instructions in question are applicable." (pp. 107-8.)

The decision in *Bush v. Southern Pacific Co.*, ante, is cited and followed in *Harper v. Northwestern Pac. R. Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821, which in turn is cited and followed in the decision of the Circuit Court of Appeals in the instant case. In the case of *Hinkle v. Southern Pacific Co.*, 12 Cal. (2d) 691, 87 Pac. (2d) 349, the Supreme Court of the State of California adopts and follows the rule as announced in *Bush v. Southern Pacific Co.*, ante, with this to say:

> "When the instruction is read in its entirety, and not in segregated portions thereof, we think it is apparent that it contained a correct exposition of the law. The gist of the instruction was to the effect that although the railroad company was not required by statutory provisions, as a matter of law, to furnish certain warning devices at public crossings, such as red lanterns to its employees, automatic signaling devices, or any light on the forward end of the lead car in any switching movement within the yard limits, nevertheless, the absence of such statutory requirement did not relieve the defendant railroad company of its obligation to exercise reasonable care for the safety of travelers at crossings, and if an ordinarily prudent person would have supplied one or more of these warnings and the injury to respondents was a result of the failure by the railroad company to furnish and maintain one or more of such warnings, then the railroad company was guilty of negligence. This is substantially correct. (Bush v. Southern Pacific Co., 106 Cal. App. 101, 289 Pac. 190.)" (pp. 701-2.)

It may thus be seen that the conclusion arrived at by the Circuit Court of Appeals from the particular facts and circumstances in the instant case finds support in the decisions of both District Court of Appeal and Supreme Court of this State.

Finally, petitioner suggests in its brief that both Young, the host, and respondent were familiar with the fact that the highway in question crossed the railroad track in question, and it was therefore under no duty or obligation to warn them of the existence of the

railroad tracks. The answer to this contention is found in the *Harper* case (ante) to the effect that a railroad track "is not a warning of danger unless one knows just where to look for it. It is only when one observes or by the exercise of reasonable care should have observed a railroad track, or where one knows that it is in a particular place and identifies the locality that it becomes a warning of danger". Furthermore, in this connection, under California law, the respondent was under no duty and was not charged with responsibility for observing the condition of the traffic upon the highway and she was under no duty to exercise an oversight as to the way in which the automobile was to be operated or to keep a lookout for impending danger. The point is illustrated in *Murphy v. National Ice Cream Co.,* 114 Cal. App. 482, 300 Pac. 91, where the court instructed the jury that the plaintiff guest was not guilty of contributory negligence as a matter of law. This ruling was sustained on appeal and the court stated (p. 489):

> "Basing their contention on the driver's testimony, defendants argue that Mrs. Murphy must have seen the truck at the point designated by the driver, or that she could have seen it if she had looked; and that if she did see it, or could have seen it had she looked, she was guilty of contributory negligence in not warning Mrs. Howard of its approach. *We are unable to subscribe to such theory because Mrs. Murphy as a guest was not charged with the responsibility for observing the condition of the traffic upon the highway,* nor was there anything she could have done after the danger was imminent to avoid a collision." (Emphasis added.)

Malone v. Clemon, 111 Cal. App. 13, 205 Pac. 70, was an action by a guest against his host. The host was held guilty of gross negligence in running into the rear of a parked truck and it was held that it was not contributory negligence for the guest to be asleep at the time of the accident and thus not able to warn the host of the parked truck. The court stated (p. 19):

> "* * * there was no obligation on the part of the guest to exercise an oversight as to the way in which the automobile was to be operated or to keep a lookout for impending danger." (Hearing in Supreme Court denied.)

In closing the discussion in this matter, it may also be well to note that under California law the negligence, if any, of a host is not to be imputed to a guest.

Murphy v. National Ice Cream Co., ante;
Malone v. Clemon, ante.

We therefore respectfully submit that the petition for certiorari should be denied.

Dated, San Francisco, California,
August 19, 1942.

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